Supreme Court, U.S.
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No. 94-1482

In the Supreme Court
of the United States

OCTOBER TERM, 1994

LEROY CLOUSER, et al.,
Petitioners,
v.
DAN GLICKMAN,
SECRETARY OF AGRICULTURE,
UNITED STATES OF AMERICA, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS IN REPLY

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I. INTRODUCTION

Pursuant to this Court's Rule 15.6, petitioners respectfully file this Reply Brief addressed to certain arguments of the government first raised in its Brief in Opposition.

The government argues that petitioners are not entitled to formal, oral evidentiary hearings before the Forest Service because petitioners' "private interest in motorized access to their claims is not weighty," that there is no risk of erroneous deprivation because Forest Service procedures constitute "an adversary administrative factfinding process" and, finally, that Forest Service procedures are "consistent with the public interest." Resp. Br. 11, 13.[1]

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[1]The government also argues that there is "no issue properly before this Court regarding the restrictions on motorized access to the Wilson placer mining claim."

II. PETITIONERS' PRIVATE INTEREST IN MOTORIZED ACCESS TO THEIR CLAIMS IMPLICATES A LEGALLY COGNIZABLE PROPERTY INTEREST.

The government characterizes petitioners' private property interests as "not weighty" because (1) the Robert E. claims have yet to be established as valid and (2) petitioners "'have not challenged [respondents'] position that the modest production from the [Thunderbolt] claim does not justify motorized access.'" Resp. Br. 11. The government's assertions are erroneous.

The government introduces the term "weighty" to distinguish whether or not petitioners' property interests are "legally cognizable." The term is devoid

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fn 1 continued:
Resp. Br. 2, n. 1. The Court of Appeals addressed all of petitioners' due process issues as they related to the Wilson Claim. Pet. App.-A 26-32, 75-80. Hence, issues regarding restrictions on motorized access to claims located on lands that have been designated Wilderness Areas and those that have not been so designated are properly before this Court.

of legal significance; it reflects the Forest Service's inability to recognize the nature of the property interests that will be affected by official Forest Service actions. Pet. 41-45.

Petitioners have challenged the Forest Service's position that the "modest" Thunderbolt production did not demand motorized access. Pet. 48-50. Petitioners cited portions of the record which illustrate that full scale mining operations with mechanized equipment were to be undertaken after road rehabilitation had been accomplished in 1989. Pet. 49.

Petitioners' private interest in motorized access to their claims is also substantial because, as the Court of Appeals acknowledged, "Forest Service decisions regarding access may indeed affect whether a claim is found to be 'valid.'". Pet. App.-A 25-26. Under the

Ninth Circuit's decision, the Forest Service, through its summary administrative review procedure, may invalidate otherwise valid claims by terminating motorized access. This ability to invalidate an otherwise valid mining claim implicates a substantial private property interest, especially when due consideration is given to the financial investment which bona fide miners expend in having their claims validated. Pet. 43-44.

III. FOREST SERVICE ADMINISTRATIVE REVIEW PROCEDURES ARE NOT "AN ADVERSARY ADMINISTRATIVE FACTFINDING PROCESS" WHICH COMPORT WITH PROCEDURAL DUE PROCESS.

The abbreviated administrative review process afforded by the Forest Service to determine mining claim access rights is not neutral because the "factfinders" are Forest Service line officers. This flaw, addressed at length by petitioners, Pet. 53-59, is not addressed by the government

in its Brief in Opposition. An administrative review system which employs Forest Service line officers as fact gatherers and decision makers is a system which is very prone to the risk of erroneous deprivation because the decision makers are not neutral. "The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all government decisionmaking." U.S. v. James Daniel Good Real Property, 114 S.Ct 492, 502 (1993).

The lack of neutrality is evidenced by the government's assertion that "petitioners did not elect to take advantage of the opportunities for oral presentation available to them in their administrative appeals." Resp. Br. 7, 13. The record reveals that oral presentation to the Forest Service was waived by the Thunderbolt petitioners precisely because "their contacts with the [Forest Service] office,

[demonstrated] ... that the posture of that office weighs against recognition of [petitioners'] mining claim rights to motorized access ... [and demonstrated] [t]he appearance of partiality and an adverse posture against [petitioners'] discovery rights" by the Forest Service. C.A.E.R. 82, 94. (bracketed matter added).[2]

Forest Service prosecutorial bias and lack of neutrality was described by Mr. Bronson C. LaMoure, a retired Director, Minerals and Geology for the Forest Service:

> "In my evaluations of actions of Forest Service offices on plans of operations, I found that the practices of the various offices were not always uniform and that some Forest Service officials

[2]The comments of Paul Vetterick, Acting State Director for Oregon and Washington, BLM, also address the propriety of Forest Service actions "when civil servants pick and choose the laws they enforce, or execute laws on whim or the turn of public opinion." C.A.E.R. 89.

> considered and acted on plans of mining operations based on perceptions of minerals programs, resource production and interrelated public interests which were contrary to the policies for approval of mining operations consistent with the program for economic prospecting, development and removal of national forest minerals under the environmental and reclamation standards. The most common perception underlying inconsistent practices was the idea that a prosecution approach was to be taken in considering plans of operations...." Pet. App. E37. (emphasis added).

All of the above evidence of Forest Service bias is uncontradicted in the record and unanswered by the government. The government fails to explain how these Forest Service procedures do not "creat[e] an impermissible risk of bias in the enforcement and administration" of mining claim access issues. Marshall v. Jerrico, Inc., 446 US 238 (1980). A "realistic possibility" exists that Forest Service officials' "judgment will be distorted by

the prospect of institutional gain as a result of zealous enforcement efforts." Supra, 446 US at 250.[3]

IV. THE FOREST SERVICE'S ABBREVIATED REVIEW PROCEDURES ARE NOT "CONSISTENT WITH THE PUBLIC INTEREST."

The government excuses the due process flaws with the Forest Service's administrative review procedures by asserting that "[j]udicial-type evidentiary hearings are time-consuming, costly, and often cumbersome." Resp. Br. 13. However, such is not the case if access issues are decided before a neutral administrative law judge within the Department of the Interior. Pet. 61-63, App.-D 29-36.

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[3]Costs of agency administration of public roadways in wilderness areas, to protect surface use and the environment, are considerably reduced when roads are closed through utilization of an abbreviated, inexpensive and "efficient" administration system. See, Supp. Info., Proposed R.S. 2477 Regs. at Pet. Supp. Br. App-B 3-4, 11.

The government's cost argument is also belied by the fact that state courts, having jurisdiction to decide the issue of establishment of R.S. 2477 rights of way, already furnish the full panoply of due process hearing protections.

The government argues that a post-deprivation remedy is available in the Court of Federal Claims "for any taking of property rights that may have occurred in the wilderness areas." Resp. Br. 14, n.9. This Court has recently viewed this argument with skepticism on the basis of "congested civil dockets in federal courts...." U.S. v. James Daniel Good Real Property, supra, 114 S.Ct at 502. In any event, the invalidation of an otherwise valid mining claim through termination of motorized access would simply negate any adequate post deprivation remedy in the Court of Federal Claims.

Finally, an R.S. 2477 public highway may be a vested, existing right which the Forest Service has no authority to regulate in any event. Pet. 36-37. Accordingly, a post-deprivation action in the Court of Federal Claims "'would not cure the temporary deprivation that an earlier hearing might have prevented.'" U.S. v. James Daniel Good Real Property, supra, 114 S.Ct at 502.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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